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MICHAEL RODAK, JR.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1972

FRANK FRANKEL, AGNES EISENBERGER and SONYA BRODY,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION et al.,

Respondents.

Docket No. 72-49

BRIEF OF AMICUS CURIAE CENTER FOR STUDY OF RESPONSIVE LAW IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1972

Frank Frankel, Agnes Eisenberger and Sonya Brody,

Petitioners,

v.

Securities and Exchange Commission et al.,

Respondents.

I. INTEREST OF AMICUS CURIAE

The Center for Study of Responsive Law [the "Center"] is a non-profit organization exempt from Federal taxation under § 501(c)(3) of the Internal Revenue Code. One of the purposes of the Center is to study the operations of Government agencies. In connection with its work, the Center frequently has occasion to request documents from Federal agencies under the provisions of the Freedom of Information Act, 5 U.S.C. § 552. Since many of these documents have been claimed

to be investigatory files within the meaning of the seventh exemption in the Act, 5 U.S.C. § 552(b)(7), the decision of the Court of Appeals for the Second Circuit in this case, which gives an expansive reading to that exemption, threatens to interfere substantially with the Center's ability to obtain the information necessary to carry out its functions. In addition, the Center has a special project in which an attorney is engaged on a full-time basis solely with litigation and other matters relating to the Freedom of Information Act. Therefore, the development of the law in this area in general, and as it relates to the investigatory files exemption in particular, is of special interest to the Center.

II. REASONS FOR ISSUANCE OF THE WRIT

A. Conflict Between Circuits

In reversing the decision of the District Court, the Court of Appeals for the Second Circuit held that even after an investigation and subsequent enforce-

ment proceeding are concluded, and although no further enforcement proceeding is contemplated, an agency's investigatory files are exempt from the requirement of disclosure under 5 U.S.C. § 552(b)(7). This decision is in direct conflict with that of the Court of Appeals for the District of Columbia, which said in Bristol-Myers Co. v. FTC, 424 F.2d 935, 939, cert. denied, 400 U.S. 824 (1970):

> If further adjudicatory proceedings are imminent, then the company's request may fall within the category the exemption was designed to control.... But the agency cannot, consistent with the broad mandate of the Act, protect all its files with the label "investigatory" and a suggestion that enforcement proceedings may be launched at some unspecified future date.

Continuing, the Court held:

> Thus the District Court must determine whether the prospect of enforcement proceedings is concrete enough to bring into operation the exemption for investigatory files, and if so whether the particular documents sought by the company are nevertheless discoverable. Id. at 939-40.

As a result, a plaintiff in the Second

Circuit will be denied access to the very same closed investigatory files that another plaintiff can obtain in the District of Columbia. This Court should grant the writ to resolve that conflict.

While the facts of these two cases differ to some degree, we submit that there is no meaningful distinction that might serve to harmonize them. In Bristol-Myers the Federal Trade Commission had initiated a proceeding against a company but later withdrew the complaint before the request for documents was made. In this case the Securities and Exchange Commission had terminated its investigation and its suit had been resolved by way of a consent decree with defendants which was entered as a judgment in the United States District Court for the Southern District of New York. In both cases the agency involved had completed its investigation and had terminated the only law enforcement proceeding which it contemplated bringing. Although the time period between the withdrawal of the complaint and the request for documents in

Bristol-Myers (over 2 years) was greater than that between the consent decree and the request for documents in this case (17 days), the issue was identical--whether investigatory files continue to qualify for a section 552(b)(7) exemption where there is no "imminent" or "concrete" prospect of future enforcement proceedings. Indeed, if there is any meaningful difference between the two cases, the argument for disclosure is greater here, since in Bristol-Myers the complaint was merely withdrawn, thus leaving open the possibility of further adjudication, whereas in this case, a consent decree binding on all parties has become a judgment of the Court.

The decision of the Court of Appeals for the Second Circuit conflicts not only with the explicit holding of Bristol-Myers, but also with the spirit of Wellford v. Hardin, 444 F.2d 21 (4th Cir. 1971). In that case, the material sought was already in the hands of the parties against whom any law enforcement proceeding might be brought. The Fourth Circuit held that, since the purpose of the investigatory

files exemption is to protect the Government's case in court by preventing premature discovery by a defendant in an enforcement proceeding, plaintiff was entitled to the documents because disclosure to the potential defendants had already taken place. The Court went on to note:

> By its terms, the seventh exemption applies only to investigatory files compiled for law enforcement purposes. The emphasis of the statute is upon the investigatory character of the files and under § 552(c), the exemption should be limited "specifically" to files of this type. It should not be enlarged, we hold, to include records of administrative action taken to enforce the law. Id. at 25.

The result reached below has produced an anomolous situation with regard to a plaintiff's ability to obtain the documents sought here. In LaMorte v. Mansfield, 438 F.2d 448 (2d Cir. 1971), the Court held that once a witness has been allowed to obtain the transcript of his testimony in a non-public investigation conducted by an agency, the transcript loses its confidential status and may be

obtained through discovery by plaintiffs and co-defendants in a suit involving that witness. Thus, in this situation if Occidental Petroleum Company, the company involved in the related civil action for which these documents are sought, had previously requested a transcript of the testimony given by its employees before the SEC,* plaintiffs in this case could easily have obtained it directly from Occidental. Yet, the Court of Appeals held that the SEC was not required to make them available to petitioner. The clear result of this decision, therefore, will be to discourage witnesses from obtaining copies of their testimony in order to avoid the risk of later having to disclose it to an adverse party in a lawsuit.

B. Importance of Issue

The issue presented in this case is of major importance to the operation of

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* The SEC has apprised all witnesses that each could obtain a copy of the transcript of his testimony. Presumably, this was done pursuant to the requirement set forth in 17 C.F.R. § 203.6.

the Freedom of Information Act. During the four years since the Act went into effect, agencies of the Federal Government relied on the investigatory files exemption at least 244 times in refusing access to documents. See Freedom of Information Act Analytic Chart, Hearings Before Subcommittee of the Committee on Government Operations, House of Representatives, 92d Cong., 2d Sess. 1338-42 (March 1972). In many of the cases that eventually reached the courts, the investigatory files exemption was one of the issues litigated. See e.g., Getman v. NLRB, 450 F.2d 670 (D.C. Cir.), stay denied, 404 U.S. 1204 (1971); Evans v. Department of Transportation, 446 F.2d 821 (8th Cir. 1971), cert. denied, 405 U.S. 918 (1972); Wellford v. Hardin, 444 F.2d 21 (4th Cir. 1971); Bristol-Myers Co. v. FTC, 424 F.2d 935 (D.C. Cir.), cert. denied, 400 U.S. 824 (1970); M.A. Schapiro & Co., Inc. v. SEC, 339 F. Supp. 467 (D.D.C. 1972); Cowles Communications, Inc. v. Department of Justice, 325 F. Supp. 726 (N.D. Cal. 1971); Wecksler v. Shultz, 324 F. Supp. 1084 (D.D.C. 1971); Cooney v. Sun Shipbuilding & Drydock Co., 288

F. Supp. 708 (E.D. Pa. 1968). The Supreme Court has never ruled on the meaning of the investigatory files exemption, and review in this case would significantly aid in clarifying this area of the law.

Supreme Court review is especially critical in this case because the decision of the Second Circuit creates a glaring loophole in the operation of the Freedom of Information Act that threatens to interfere with its basic purpose of providing the public with greater access to information held by the Federal Government.* S. Rep. No. 813, 89th Cong., 1st Sess. 5-6 (1965); H.R. Rep. No. 1497, 89th Cong., 2d Sess. 6 (1966). In order

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* The Second Circuit too narrowly limited the group of persons entitled to the benefits of the Act when it said that "[i]n the present case disclosure would have but a small effect with respect to the general purpose of the Act, the better informing of the electorate as to the operations of the government" [emphasis added]. As the House and Senate Reports, quoted in the opinion, make clear, the purpose is to protect the right of any individual to find out how the Government is operating. The Court has seriously misconceived its function if, as the above quotation suggests, it

to reconcile this purpose with the effective operation of government agencies, the Act created an exemption for investigatory files, the basic goal of which was to prevent premature disclosure of an agency's case when engaged in law enforcement activities. H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966). See also Bristol-Myers Co. v. FTC, 424 F.2d 935, 939 (D.C. Cir.), cert. denied, 400 U.S. 824 (1970); Cooney v. Sun Shipbuilding & Drydock Co., 288 F. Supp. 708, 712 (E.D. Pa. 1968). However, if an investigatory file prepared for law enforcement purposes is foreover exempt from the requirement of disclosure, agencies will be able to avoid granting requests for any documents

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has taken upon itself to determine whether the information sought will be of general interest to the electorate. Any information, not subject to a specific exemption, must be disclosed, Soucie v. David, 448 F.2d 1067, 1076-77 (D.C. Cir. 1971), no matter how trivial it may seem and whatever the purpose for which it is sought. The fact that any citizen wishes to have access is conclusive evidence that disclosure would serve the function of informing the public.

that bear upon its regulatory function even though their disclosure would not harm the agency's case in any current or foreseeable enforcement proceeding. Such a broadened scope for the investigatory files exemption increases the likelihood that agencies will seek to utilize it in order to evade the general disclosure requirement of the Act. See generally, Joan M. Katz, The Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act, 48 TEXAS L. REV. 1261 (1970).

This prospect is neither remote nor speculative. Nearly every government agency performs some law enforcement functions, and many important documents are the product of research and investigations that might be claimed to bear some relation, however indirect, to law enforcement. Thus, there is a strong temptation for any government agency that wishes to avoid disclosure to invoke the investigatory files exemption as a matter of course. In some cases the claim of investigatory files exemption has bordered on the frivolous. For example, in Getman v. NLRB, 450 F.2d 670 (D.C. Cir.), stay denied, 404 U.S. 1204 (1971), the Board claimed that an Excelsior list--

containing the names and addresses of the employees of a plant entitled to vote in an election under the NLRA-- was an investigatory file. While such claims will ultimately be defeated in the courts, they prevent the fulfillment of the provision in the Freedom of Information Act that "each agency ... shall make the records promptly available to any person." 5 U.S.C. § 552(a)(3) [emphasis added]. Thus, if the Act is to become largely self-executing, and if its primary purpose is to be met, a greater limitation on the scope of the investigatory files exemption is required.

In our experience we have encountered an almost reflex claim of "investigatory files" to our requests for various research reports. The decision below threatens to aggravate that problem, thereby making it more difficult to learn what the Government is doing, at least without taking every request to court. For example, the Department of Agriculture recently denied a request for audit reports compiled by Inspector General which survey the compliance of programs receiving Federal

assistance with Title VI of the Civil Rights Act of 1964. The Department of Agriculture refuses to disclose the documents on the ground that under the decision of the Court of Appeals for the Second Circuit they were investigatory files subject to exemption even though no enforcement proceeding has been commenced or planned since the completion of the audit. If a refusal to disclose such reports is justified in these circumstances, then it is difficult to see how a citizen can obtain the results of the research of any agency, thereby interfering with efforts to determine whether a particular agency is in fact carrying out its law enforcement duties. Under the decision of the Second Circuit, an agency could sit on its investigatory files indefinitely without enforcing the law, and private citizens would remain powerless to challenge such inaction since they would lack the evidence that would demonstrate the agency's neglect.

Recognizing this problem, the District Court in Wecksler v. Shultz, 324 F. Supp. 1084 (D.D.C. 1971) held that docu-

ments prepared under the supervision of the Secretary of Labor in connection with inspections of plants subject to the Walsh-Healy Public Contracts Act, were subject to disclosure under the Freedom of Information Act. Similarly, in M.A. Schapiro & Co., Inc. v. SEC, 339 F. Supp. 467 (D.D.C. 1972), the District Court ordered the disclosure of the SEC's Staff Study on the off-board trading problem raised by the New York Stock Exchange's original Rule 394, plus all transcripts made and documents received by the SEC in the course of that investigation. The Court held that, although these documents were arguably "investigatory files compiled for law enforcement purposes, the agency failed to proffer any facts that would show it contemplated commencing a law enforcement proceeding bases upon that investigation within the reasonably near future.

The Court of Appeals for the Second Circuit seems to have tacitly recognized that the request for disclosure of investigatory files can not be denied where no law enforcement proceeding is contem-

plated on the ground that premature disclosure would injure the Government in some hypothetical future case. Instead of denying disclosure because of the likelihood of a law enforcement proceeding, the Court of Appeals relied on the argument that unlimited disclosure of investigatory files would hinder an agency's performance by revealing its investigatory techniques and procedures.

This argument is flawed in several respects. First, despite the Court's assertion to the contrary, there are no indications in either the House or Senate Reports that one of the Congressional purposes behind the investigatory files exemption was to keep confidential the procedures by which an agency conducts its investigations. Those Reports speak exclusively of the need to prevent premature disclosures in order to protect the Government's case in court. S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965); H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966).

Second, the Court's heavy reliance on Evans v. Department of Transportation,

446 F.2d 821 (8th Cir. 1971), cert. denied, 405 U.S. 918 (1972), is also misplaced. In Evans the Eighth Circuit refused to order the Department of Transportation to disclose the identity of an informant even though no further disciplinary proceedings were contemplated. The Court suggested that the investigative actions of an agency would be impaired if individuals could not report apparent violations to the Government in confidence. As an additional, and we suggest more appropriate basis for denying the request, the Court in Evans relied upon 49 U.S.C. § 1504, which prohibits disclosure of information given in confidence, which is made applicable to the Freedom of Information Act by 5 U.S.C. § 552(b)(3). Thus, at most, Evans created a narrow further exemption beyond the express purpose of the investigatory files exemption.

However, the decision below creates a situation in which any document, once placed in a file relating to a law enforcement investigation, is forever exempt from disclosure. The documents requested by petitioners are merely the transcripts

of testimony before the SEC and the exhibits related to that testimony. Since the SEC has already sent petitioners a list of the names of all the witnesses who testified before it, there is no question, as there was in Evans, of protecting the confidentiality of an informant. And even if one purpose of this exemption is to keep confidential the procedures by which an agency conducts its investigations, it is hard to see how the disclosure of the requested transcripts, consisting of questions and answers, would in any way interfere with the operations of the SEC, particularly since these procedures were made available to the very persons against whom the investigation was directed.

III. CONCLUSION

Because of the possibility that the investigatory files exemption may inhibit prompt public access to important documents to which it has a right, the Court in Bristol-Myers wisely limited its use to the situation where disclosure would create a real risk of interfering with

the agency's efforts in an actual or imminent law enforcement proceeding. The Supreme Court should grant the petition for a writ of certiorari here in order to resolve the conflict between the Courts of Appeals for the District of Columbia and the Second Circuit and to reverse the decision of the latter for its failure to carry out the purpose of the Freedom of Information Act.

Respectfully submitted,

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